

Pinkerton, Inc., d/b/a CPP Pinkerton and International Union, United Plant Guard Workers of America (UPGWA), Petitioner. Cases 13-RC-17501 and 13-RC-17910

November 30, 1992

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on March 3, 1992,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to the Regional Director's Third Supplemental Decision and Direction of Election. The tally of ballots shows 60 votes for and 62 votes against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs,² and adopts the hearing officer's findings and recommendation concerning all objections³ except Objection 4. As explained below, we disagree with the hearing officer's conclusion that this objection has merit. Accordingly, we find that a certification of results of election should be issued.

In Objection 4, the Petitioner alleged that the following letter sent by Site Supervisor Michael J. Pace Sr. to employees at the U.S. Steel Gary site in late January or early February constituted a threat of job loss:

To all Security Officers at USS Gary Works,

As you may have heard, after much legal wrangling which has lasted several years, the Labor Board in Chicago has ruled that an election will be held for our guards in the Gary district on February 14, 1992. The matter is now on appeal to the Labor Board in Washington, so everything could change. As we get more information about the election, we will pass it on to you.

At this point, I just want to pass on some clear information to you, because I know you may have been hearing many different claims from many different sources. You should know this: your wages are pretty much determined by our contract with U.S. Steel. Thus, any real change in your

wages will have to be negotiated with U.S. Steel. Then you have to ask yourself—why would our client agree to an increase? U.S. Steel, like most of our clients, can place their work elsewhere if we try to raise our wages too high.

You should bear this in mind when the plant guard union tells you they can get you wages higher than what you are now earning. This can only happen if our client agrees to pay for the increase. If the union demands an increase, the client is completely free to cancel our contract and take its business elsewhere. Then we would no longer have any jobs at the U.S. Steel facility.

To put it bluntly, the plant guard workers' wages at other facilities is totally irrelevant. What U.S. Steel is willing to pay (and what Pinkerton will agree to) is what matters.

To conclude, we want you to know Pinkerton's position that the plant guard union is not wanted nor needed at the U.S. Steel facility. Quite frankly, there is precious little to gain, and much to lose, from such a decision.

Please let me know if you have any questions, and

Please VOTE NO on February 14!

Sincerely yours,

Capt. M. Pace

Pace testified that in many conversations with him, U.S. Steel Managers Nylen and Kolb stated that U.S. Steel did not want the Union at U.S. Steel sites, that corporate sentiment was opposed to the presence of the Union, and that U.S. Steel would exercise its contractual option to give 30 days' notice to the Employer,⁴ should the Union win the election. Pace also testified that several employees told him that an unknown agent of the Union had said that if the Union won the election there would be more uniform wages and across-the-board wage increases. According to Pace, he felt compelled to warn the bargaining unit, and he did this in the letter. In addition, Pace told employees who spoke to him that the U.S. Steel contract had a 30-day-notice cancellation clause. Pace told employees that U.S. Steel had this option and that he, Pace, felt U.S. Steel would pursue it.⁵

The hearing officer found that the letter was tantamount to a threat of job loss and that no objective

¹ The Region conducted a secret-ballot election by mail between February 7 and 24, 1992. The Region counted the ballots on March 3.

² Both the Petitioner and the Employer filed exceptions and briefs, the Employer filed a brief in opposition to the Petitioner's exceptions, and the Petitioner filed a brief in response to the Employer's exceptions.

³ In the absence of exceptions, we adopt pro forma the hearing officer's disposition of Objections 2, 3, and the additional (Catchall) objection.

⁴ The pertinent contract section states:

ARTICLE 27—CANCELLATION, TERMINATION AND SUSPENSION

27.1 Owner shall have the unconditional option and right, exercisable at Owner's sole election, to terminate this Agreement for Owner's convenience at any time upon furnishing thirty (30) days advance written notice thereof to Contractor.

⁵ Pace testified that Nylen told him that U.S. Steel was actively seeking bids from competitors, and at one time Nylen had representatives from Wells Fargo in his office.

facts were presented in support of the assertion that a third party controlled the fate of the Employer's jobs at the U.S. Steel sites. The hearing officer noted that the Employer failed to present the direct testimony of U.S. Steel Managers Nylen and Kolb at the hearing. The hearing officer therefore drew a negative inference concerning the statements attributed by Pace to Nylen and Kolb and concluded that Pace's testimony in this respect was not credible. Accordingly, the hearing officer found that the letter constituted objectionable conduct.

The Employer excepted on two grounds. First, the Employer argued that the letter constituted a statement of opinion rather than a threat of reprisal and, therefore, the objective evidence test is irrelevant. Second, the Employer argued that even if the letter is viewed as a "threat," the record contains the requisite objective evidence. In this respect, the Employer cited the termination clause in its contract with U.S. Steel and testimony of employees that, even before they received Pace's letter, they knew U.S. Steel could terminate the contract at will.⁶

We agree with the Employer's contention that Pace's letter constitutes a mere statement of opinion concerning possible third-party action and as such is

no threat of reprisal.⁷ We note particularly that the language at issue in Pace's letter connotes possibility, not probability. Thus, the letter opines:

U.S. Steel . . . can place their work elsewhere if we try to raise our wages too high If the union demands an increase, the client is completely free to cancel our contract and take its business elsewhere. Then we would no longer have any jobs at the U.S. Steel facility.

We find that this language merely cautioned that the Employer's contracts on any of its jobs *could* be jeopardized if it did not remain competitive. It did not state that any adverse consequences *would* occur if the employees chose to unionize. This plain statement of fact does not constitute objectionable conduct in context.⁸ Accordingly, we find no merit in the Petitioner's Objection 4.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Union, United Plant Guard Workers of America (UPGWA) and that it is not the exclusive representative of these bargaining unit employees.

⁶Robert Cottrell and John D'Agostino testified that they were aware that client companies were free to choose another security contractor at any time.

The Employer also argued in its exceptions that the hearing officer improperly drew a negative inference from the Employer's failure to have U.S. Steel Managers Nylen and Kolb testify directly, and improperly discredited Pace concerning his testimony about the conversations with Nylen and Kolb.

⁷We therefore need not reach the Employer's second theory in support of its exception.

⁸See *Buck Brown Contracting Co.*, 283 NLRB 488 (1987); *Daniel Construction Co.*, 264 NLRB 569, 569-571 (1982). In *BI-LO*, 303 NLRB 749 (1991), relied on by the hearing officer, the letter at issue conveyed the employer's message that employee job security *would be* jeopardized if employees chose to be represented by a union. The letter stated: "Our constant effort to see that you have a steady job is one of the many reasons you should vote NO UNION on election day." *BI-LO*, *supra*.